

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

LENA MUHAMMAD,)	
)	
Plaintiff,)	
)	
v.)	No. 18-cv-2857-MSN-tmp
)	
ALEX M. AZAR II, Secretary of)	
the U.S. Department of Health)	
and Human Services, in his)	
official capacity; DANIELLE W.)	
BARNES, Commissioner of the)	
Tennessee Department of Human)	
Services, in her official)	
capacity; and BASEM GIRGIS,)	
an official with the Tennessee)	
Department of Human Services,)	
in his official capacity,)	
)	
Defendants.)	

REPORT AND RECOMMENDATION

Before the court by order of reference is defendant Alex M. Azar II's Motion to Dismiss.¹ (ECF Nos. 22 & 23.) For the following reasons, it is recommended that the Motion to Dismiss be granted.

I. PROPOSED FINDINGS OF FACT

¹The undersigned was also referred a Motion to Dismiss filed by the state defendants in this case. (ECF Nos. 19 & 23.) A separate report and recommendation recommending that the Motion be granted in part and denied in part was issued, which was subsequently adopted by the court. (ECF Nos. 30 & 31.) The instant report and recommendation's proposed findings of facts are substantially similar to those in the previous report and recommendation, as is the legal analysis in sections I-A, I-C, and I-F.

Plaintiff Lena Muhammad filed the instant complaint on December 17, 2018. (Complaint, ECF No. 1.) The complaint alleges several causes of action against defendants Alex M. Azar II, the Secretary of the United States Department of Health and Human Services ("HHS"), Danielle W. Barnes, the Commissioner of the Tennessee Department of Human Services ("TDHS"), and Basem Girgis, an employee of TDHS, all in their official capacities.² The following findings of fact are based on the well-pleaded allegations in the complaint and the exhibits attached to the complaint.

In 1993, when Muhammad (then known as Lena Boyd) was 22 years old, she pleaded guilty in California state court to "assault with deadly weapon by force likely to produce great bodily injury" (California Penal Code § 245) and "discharge of firearm at an inhabited dwelling house, occupied building, vehicle, aircraft, inhabited housecar or inhabited camper" (California Penal Code § 246). (ECF No. 1 at 4.) The guilty plea, which is attached to the complaint as Exhibit 3, indicates that "on [February] 20, 1993 in Orange County I committed an assault on Andra Boyd with a firearm

²According to the complaint, Girgis is a paralegal and Licensing Supervisor Designee with TDHS. (ECF No. 1 at 2.) According to defendants, Girgis is the Program Coordinator for Child and Adult Care Licensing. (See Defs.' Mem. of Law in Support of Mot. to Dismiss, ECF No. 20 at 2 n.1.) For purposes of ruling on this Motion to Dismiss, the court will accept as true the complaint's allegations regarding Girgis's job title, although it is worth noting that this discrepancy is immaterial to the issues raised in the Motion.

and while he was in a motor vehicle." (Id. at 33.) The criminal charges stemmed from an incident that involved her "shooting at, but missing, her abusive then-husband." (Id. at 4.) Muhammad was convicted of these felony offenses and served a mandatory two-year prison sentence. Since her release from prison, she has not had any other criminal convictions. (Id.)

In 2006, Muhammad applied with the State of Tennessee for a waiver that would allow her to work at a child care facility. (Id.) Specifically, she filed an application with TDHS pursuant to Tenn. Code Ann. 71-3-507(f), which establishes a procedure for obtaining a waiver for persons who would otherwise be excluded under state and federal law from working at or operating a child care facility based on their criminal background. (Id. at 5.) Following a hearing before a three-member panel of the TDHS Criminal Exclusion Advisory Committee, Muhammad received a letter dated December 4, 2006, granting her the waiver and stating that "the Department has determined that you have established extenuating circumstances which would clearly warrant a waiver[.]" (Id. at 5, 35.) In 2007, Muhammad opened Lena's Little Ones, a child care facility which she operated out of her home. (Id. at 3.) In 2010, Muhammad opened a second child care facility next door to her home, Lena's Little Ones II. (Id. at 4.) TDHS sent her letters in March 2010 and October 2011, confirming that she was not excluded from working at these two facilities. (Id. at 5, 37, 39.) Since opening these

facilities, Muhammad has been in full compliance with TDHS's requirements and has received the highest "Three Star" designation every year. (Id. at 4.)

On July 31, 2018, TDHS sent Muhammad a letter stating that it would be making changes to the waiver review process in order to implement the federal Child Care and Development Block Grant ("CCDBG") comprehensive background check requirements. (Id. at 5, 42.) The letter stated:

CCDBG provisions include requirements for excluding individuals convicted of particular crimes from working in child care facilities, but the provisions for granting waivers for excludable CCDBG offenses are now limited to felony drug offenses that occurred more than five years ago and misdemeanors and felonies not included in the list below.

Below is a listing of the excludable offenses under CCDBG that do NOT include a provision for requesting a waiver:

. . .

- A felony consisting of: . . . Physical assault or battery;

. . .

Existing waivers for excludable offenses not eligible for a waiver under CCDBG will not be extended when the individual is reprinted (all staff are reprinted every five years).

(Id. at 42.) According to the complaint, the July 31, 2018 letter did not "put [Muhammad] on notice that the waiver she had had since 2006 might be revoked. The crimes listed in the letter did not appear to apply in any way to her 1993 conviction." (Id. at 6.)

On September 4, 2018, TDHS sent a letter to Muhammad stating

that, effective immediately, she would be excluded from "operating, working in, volunteering at, providing substitute services to, residing in, or having any access whatsoever to children/adults in a child care agency/adult day care agency at any time that children/adults enrolled in the agency are present," due to her criminal conviction. (ECF No. 1 at 6, 45.) The letter informed Muhammad that she could (1) appeal the exclusion and receive an administrative hearing, but only on grounds that "you are not the person identified in the records used to determine that you should be excluded" or "the basis for the exclusion has been dismissed, resulted in an acquittal, or expunged"; and/or (2) "ask to receive an administrative *waiver* that will exempt you from exclusion." (Id. at 46-47) (emphasis in original). Regarding the administrative waiver, the letter advised that "[a]s part of the waiver request, you may present information and documentation that demonstrates that there are extenuating circumstances that provide a good reason to waive the exclusion." (Id. at 47.) The letter stated that an "advisory committee will consider whether those circumstances clearly warrant a waiver of the exclusion and will make a recommendation to the Director of Child and Adult Care Licensing," and that she could "appeal a decision by the Director of Child and Adult Care Licensing to reject a waiver request and receive a hearing under the Uniform Administrative Procedures Act (T.C.A. §§ 4-5-301 et seq.) by sending a request for appeal, in writing, to

the Division of Appeals and Hearings within ten (10) days of the mailing date of the Director's decision[.]" (Id. at 47.)

Muhammad sent letters to TDHS on September 4, 2018, requesting both an appeal of the exclusion decision set forth in the September 4 letter and an administrative waiver. (Id. at 6, 49, 51.) On November 19, 2018, Muhammad and TDHS representatives, including Girgis, appeared for a Contested Case hearing. TDHS took the position that it could not grant a waiver from exclusion because Muhammad's 1993 conviction was a "felony consisting of physical assault or battery."³ (Id. at 7-8.) As of the date of the filing of the complaint, no decision had been rendered on Muhammad's request for a waiver. (Id. at 8.)

In her complaint, Muhammad asserts that, since September 4, 2018, she has "been unable to be at her home when enrolled children are present, i.e., from 6:00 a.m. until 6:00 p.m.," and has incurred "many expenses and logistical hardships" including having to hire two additional staff members to substitute for her and "to insure that the required adult/child ratios are maintained and that other regulatory requirements are met." (Id. at 20.) As to defendant Secretary Azar, Muhammad alleges that the federal CCDBG

³Attached as an exhibit to the complaint is a letter from TDHS, dated September 11, 2018, informing Muhammad that a Child Care appeal hearing would be held on October 25, 2018. (ECF No. 1 at 87.) It does not appear from the complaint that a hearing was held on October 25.

statute, 42 U.S.C. § 9858f,⁴ and its implementing regulation, 45 C.F.R. § 98.43, violate her constitutional rights to due process

⁴42 U.S.C. § 9858f, titled "Criminal background checks," provides in relevant part as follows:

(a) In general

A State that receives funds to carry out this subchapter shall have in effect -

(1) requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of child care providers described in subsection (c)(1); and

(2) licensing, regulation, and registration requirements, as applicable, that prohibit the employment of child care staff members as described in subsection (c).

. . . .

(c) Prohibitions

(1) Child care staff members

A child care staff member shall be ineligible for employment by a child care provider that is receiving assistance under this subchapter if such individual

. . . .

(D) has been convicted of a felony consisting of -

(i) murder, as described in section 1111 of Title 18;

(ii) child abuse or neglect;

(iii) a crime against children, including child pornography;

(iv) spousal abuse;

(v) a crime involving rape or sexual assault;

(vi) kidnapping;

(vii) arson;

(viii) physical assault or battery; or

(ix) subject to subsection (e)(4), a drug-related offense committed during the preceding 5 years;

. . . .

(j) Effective date

. . . .

(3) Penalty for noncompliance

Except as provided in paragraphs (1) and (2), for any fiscal year that a State fails to comply substantially with the requirements of this section, the Secretary shall withhold 5 percent of the funds that would otherwise be allocated to that State in accordance with this subchapter for the following fiscal year.

and equal protection. (Id. at 8-13.) Specifically, Muhammad alleges that she was "deprived of her constitutionally protected property interest in her licenses to operate her child care facilities and was further barred from her home while enrolled children were present, without notice or a hearing." (Id. at 8-9.) Muhammad alleges that these laws are unconstitutional as applied to her because they lack any provisions for pre-deprivation notice or hearing, and lack adequate post-deprivation remedies. (Id. at 9-10.) Muhammad further claims that the challenged federal laws are unconstitutionally vague (specifically with regard to the term "physical assault"), that there is no rational basis for permanently excluding someone convicted of "physical assault or battery" from operating a licensed child care business (especially based on a conviction that is over 25 years old), and that "a regulatory scheme under which being convicted of 'physical assault or battery' permanently bars an individual from working in a child care facility, but only bars someone from adopting or fostering a child for five years [compared to 45 C.F.R. § 1356.30]," amounts to a denial of her right to equal protection. (Id. at 12-13.)

As to defendants Commissioner Barnes and Girgis, Muhammad alleges that she received a waiver from TDHS in 2006 and continued to receive the waiver through September 4, 2018, and she received a "clean" background check as recently as May 29, 2018. (Id. at 15-16.) According to Muhammad, because the July 31, 2018 letter from

TDHS stated that "[e]xisting waivers for excludable offenses not eligible for a waiver under CCDBG will not be extended when the individual is reprinted (all staff are reprinted every five years)," she was entitled to have her waiver renewed for another five years, but was instead deprived of "the use of her license without due process, and in a manner that was arbitrary, capricious and lacking any legitimate government purpose." (Id. at 15-16.) Muhammad contends that at the Contested Case hearing, Girgis testified that Muhammad's request for a waiver "was not processed in accordance with any procedures" as required under applicable Tennessee laws, was "denied out of hand because she was not entitled to a waiver," and that the right to apply for an administrative waiver outlined in the September 4 letter "wasn't real." (Id. at 18.) Muhammad alleges that "[e]ven when confronted with their obviously illegal treatment of Plaintiff, [TDHS] officials, acting under color of state law, have knowingly and deliberately continued to deprive Plaintiff of her protected property right to her licenses to operate her child care facilities, without due process and in willful derogation of her constitutional rights." (Id. at 19.)

Muhammad seeks both preliminary and permanent injunctions requiring the defendants to "immediately rescind the exclusion of Plaintiff from her child care businesses, and that those persons be further enjoined from taking any adverse regulatory action against

Plaintiff concerning the issues of criminal background checks and/or exclusion pending a trial[.]” (Id. at 22.) In addition to injunctive relief, she seeks a declaratory judgment that 42 U.S.C. § 9858f and 45 C.F.R. § 98.43 are unconstitutional and violate her rights to procedural and substantive due process and to equal protection, damages against the TDHS defendants pursuant to 42 U.S.C. § 1983, and attorney’s fees from the TDHS defendants pursuant to 42 U.S.C. § 1988. (Id. at 21-23.)

II. PROPOSED CONCLUSIONS OF LAW

A. Standard of Review

Secretary Azar brings his Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Federal courts are courts of limited subject-matter jurisdiction and can adjudicate only those claims authorized by the Constitution or an act of Congress. Chase Bank USA, N.A. v. City of Cleveland, 695 F.3d 548, 553 (6th Cir. 2012). A challenge to this court’s subject-matter jurisdiction can come in two forms. A facial attack accepts the material allegations of the complaint as true but insists nonetheless that the court lacks subject-matter jurisdiction to hear the case. Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co., 491 F.3d 320, 330 (6th Cir. 2007). A factual attack claims that the court lacks subject-matter jurisdiction regardless of what the plaintiff has pleaded and requires the trial court to weigh the evidence before it in determining whether that is the case. Id.

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court views Muhammad's allegations in the light most favorable to her and accepts all well-pleaded factual allegations as true. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). However, "[t]he factual allegations in the complaint need to be sufficient to give notice to the defendant as to what claims are alleged, and the plaintiff must plead 'sufficient factual matter' to render the legal claim plausible, i.e., more than merely possible." Fritz v. Charter Twp. of Comstock, 592 F.3d 718, 722 (6th Cir. 2010) (quoting Iqbal, 556 U.S. at 677). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)). To satisfy this requirement, a plaintiff must plead more than "labels and conclusions," "a formulaic recitation of the elements of a cause of action," or "naked assertions devoid of further factual enhancement." Id. (alteration omitted) (quoting Twombly, 550 U.S. at 555, 557). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

B. Standing

The Secretary's first argument is that Muhammad lacks standing. (ECF No. 22.) The Secretary claims that the federal disqualification requirements apply only to child care facilities that serve children receiving federal block grant funds. (Id.) The Secretary asserts that Muhammad does not allege she serves or served children receiving federal block grant funds, and that as a result, her injuries cannot be traced back to HHS. (Id.) The Secretary argues this means Muhammad does not have standing. (Id.) In her response, Muhammad acknowledges that her complaint does not "explicitly" allege that she cares for children receiving federal block grants, but argues this is implied by the state's subsequent course of conduct. (ECF No. 29.)

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 149 (2010)). To satisfy the second requirement, "the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (internal quotations, citations, and alterations omitted). A plaintiff seeking federal jurisdiction "must 'clearly and

specifically set forth facts sufficient to satisfy [the three] Article III standing requirements.'" Rosen v. Tennessee Com'r of Fin. & Admin., 288 F.3d 918, 927 (6th Cir. 2002) (quoting Moore's Federal Practice § 101.31 (3d ed. 2001)). When a party fails to allege facts sufficient to establish standing, the complaint must be dismissed for lack of subject-matter jurisdiction. Id.

Muhammad claims that her injury is fairly traceable to the Secretary because the federal disqualification requirements bar her from having access to her daycare and Secretary Azar is the head of the federal agency in charge of implementing the disqualification requirements. The federal disqualification requirements apply only to child care providers that care for children receiving federal block grant funds. 42 U.S.C. § 9858f(c)(1)(D)(vii) ("A child care staff member shall be ineligible for employment by a child care provider that is receiving assistance under this subchapter if such individual . . . has been convicted of a felony consisting of physical assault or battery"); Child Care and Development Fund (CCDF) Program, 81 Fed. Reg. 67438, 67499 (preamble to HHS final rule implementing the disqualification requirements) ("[The federal] employment disqualifications specifically do not apply to child care staff members of licensed providers who do not serve children receiving CCDF subsidies."). If Muhammad was deprived of access to her daycare by TDHS, but was not covered by the federal disqualification requirements, then her injury is traceable only to

the TDHS defendants and not to the Secretary. See Lujan, 504 U.S. at 560. As such, to sue the Secretary, Muhammad needs to allege that her daycare serves children who receive federal block grant funds.⁵ She has not done so, and the court cannot assume that this is true by implication. It is recommended that Muhammad's claims against the Secretary be dismissed for lack of standing.

Ordinarily, if a federal court is presented with both a jurisdictional question and a merits question, and it finds it lacks jurisdiction, it does not proceed to the merits question. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430-31 (2007) ("[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction)[.]"). However, because the defendant has made, and the undersigned has been referred, a motion based on both Rules 12(b)(1) and 12(b)(6), the undersigned addresses the Rule 12(b)(6) grounds for the sake of completeness.

C. Substantive Due Process

The Secretary contends that the complaint fails to state a

⁵Muhammad has not alleged that the Secretary failed to enforce federal rules about due process in the disqualification process against the state. Some courts have held that such claims may appropriately be brought against federal defendants administering similarly structured programs because the federal official's failure to act is both fairly traceable to the deprivation of due process and redressable through an injunction or declaratory judgment. See Banks v. Sec'y of Indiana Family & Soc. Servs. Admin., 997 F.2d 231, 240 (7th Cir. 1993).

claim for a substantive due process violation. Under the Fifth Amendment to the United States Constitution, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law" U.S. Const. amend. V. The clause has both substantive and procedural components. EJS Props., LLC v. City of Toledo, 698 F.3d 845, 855 (6th Cir. 2012). The substantive component of the Fifth Amendment's Due Process Clause establishes that certain state governmental deprivations of "life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed.'" Range v. Douglas, 763 F.3d 573, 588 (6th Cir. 2014) (quoting Pearson v. City of Grand Blanc, 961 F.2d 1211, 1216 (6th Cir. 1992)).

Substantive due process protects "a narrow class of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and the interest in freedom from government actions that 'shock the conscience.'" Id. (quoting Bell v. Ohio State Univ., 351 F.3d 240, 249-50 (6th Cir. 2003)). "[T]he list of fundamental interests is short and includes: the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to terminate one's pregnancy, and possibly the right to refuse unwanted lifesaving medical treatment." Langston v. Charter Twp. of Redford, 623 F. App'x 749, 759 (6th Cir. 2015) (citing Washington v. Glucksberg,

521 U.S. 702, 720 (1997)). The complaint fails to allege that the government action at issue affects a fundamental interest.

"When the conduct in question has been taken by an executive officer, the action violates substantive due process only if it can be characterized as 'arbitrary, or conscience shocking, in a constitutional sense.'" Handy-Clay v. City of Memphis, 695 F.3d 531, 547 (6th Cir. 2012) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 847 (1998)) (citation and internal quotation marks omitted). "Moreover, this characterization applies to only the most egregious official conduct, conduct that is so brutal and offensive that it [does] not comport with traditional ideas of fair play and decency." Id. at 547-48 (internal citations and quotations omitted). "The conscience-shocking limit on substantive due process claims serves to keep the doctrine from expanding to cover administrative incompetence or irresponsibility." Brown v. Detroit Pub. Sch. Cmty. Dist., 763 F. App'x 497, 504 (6th Cir. 2019) (citing Cty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998)).

Even accepting all well-pleaded facts as true, the court finds that the type of government action attributed to the Secretary here simply does not rise to the level of conscience-shocking necessary to sufficiently allege a substantive due process claim. "Where government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is

rationaly related to a legitimate state interest." Valot v. Se. Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1228 (6th Cir. 1997) (citations omitted); see also Does v. Munoz, 507 F.3d 961, 966 (6th Cir. 2007) ("We conduct rational-basis review of [government actions] that do not implicate a plaintiff's fundamental rights.").

"Even foolish and misdirected provisions are generally valid if subject only to rational basis review." Craigmiles v. Giles, 312 F.3d 220, 223-24 (6th Cir. 2002). "[A] statute is subject to a 'strong presumption of validity' under rational basis review, and we will uphold it 'if there is any reasonably conceivable state of facts that could provide a rational basis.'" Id. at 224 (quoting Walker v. Bain, 257 F.3d 660, 668 (6th Cir. 2001)). "Those seeking to invalidate a statute using rational basis review must 'negative every conceivable basis that might support it.'" Id. (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

The federal statute the Secretary administered and its implementing regulations as applied here limit an individual with a conviction for a violent felony from working with children at a child care facility. Shielding children from individuals with a conviction for a violent felony is a legitimate government interest. Moreover, limiting the access of those workers to children rationaly relates to accomplishing that end. Accordingly, there is a rational relationship and legitimate governmental interest in the limitation imposed. It is recommended

that the Motion to Dismiss Muhammad's substantive due process claim be granted.

D. Void for Vagueness

The Secretary next moves to dismiss Muhammad's void-for-vagueness claims. The Due Process Clause requires that laws governing private conduct not be overly vague. Belle Maer Harbor v. Charter Twp. of Harrison, 170 F.3d 553, 556 (6th Cir. 1999). "The vagueness doctrine has two primary goals: (1) to ensure fair notice to the citizenry and (2) to provide standards for enforcement by police, judges, and juries." Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 551 (6th Cir. 2007). Accordingly, there are two prongs to the void-for-vagueness test: fair notice and nondelegation. Id. Fair notice requires that a statute's "'prohibitive terms [be] clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.'" Miller v. City of Cincinnati, 622 F.3d 524, 539 (6th Cir. 2010) (quoting United Food & Commercial Workers Union Local 1099 v. Southwest Ohio Regional Transit Auth., 163 F.3d 341, 358-59 (6th Cir. 1998)). Nondelegation requires that the law have "explicit standards" for enforcement such that "basic policy matters" are not left for "resolution on an *ad hoc* and subjective basis." Cleveland Fire Fighters, 502 F.3d at 551 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)) (internal quotation marks omitted).

How stringently a court should apply the vagueness doctrine depends on the type of law and kind of case at issue. Id. Civil laws are subject to less scrutiny than criminal laws, and laws governing ordinary conduct are subject to less scrutiny than those governing fundamental rights. Id. Except for certain First Amendment challenges, a litigant challenging a statute on vagueness grounds as applied can only prevail if the statute is vague with respect to the litigant's specific conduct. Columbia Nat. Res., Inc. v. Tatum, 58 F.3d 1101, 1109 n.6 (6th Cir. 1995).

The Secretary does not contest the applicability of the void-for-vagueness doctrine to the provisions of federal law at issue here.⁶ However, Muhammad has not met her burden to show vagueness.

⁶It is not obvious to the undersigned that the void-for-vagueness doctrine applies here. The vagueness doctrine applies to laws governing private conduct – laws which say what a citizen can or cannot do. FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) (“A fundamental principle in our legal system is that laws *which regulate persons or entities* must give fair notice of conduct that is forbidden or required.”) (emphasis added). But the federal law at issue here does not tell private citizens to do anything. Instead, it instructs the Secretary to promulgate regulations that instruct certain states to create rules that govern private conduct; plus, the conduct being regulated here – working at a daycare that receives federal funds – is only arguably private. This distinction matters because “Congress simply cannot do its job absent an ability to delegate power under broad general directives.” Mistretta v. United States, 488 U.S. 361, 372 (1989). Congress's power to delegate rulemaking power is limited by the non-delegation doctrine, which is considerably more deferential than the void-for-vagueness doctrine. See generally Gundy v. United States, 139 S. Ct. 2116 (2019). But if every law that delegates power to create regulations that govern private conduct were directly subject to void-for-vagueness challenges, the distinction between the two doctrines would be erased. However, because the Secretary does not argue against the application of the void-for-

On the fair notice issue, the question is whether a reasonable person would understand that the federal disqualification requirement's reference to "a felony consisting of . . . physical assault or battery" would apply to a conviction for "assault with a deadly weapon by force likely to produce great bodily injury." 42 U.S.C. § 9858f; (ECF No. 1, 4.) Muhammad's primary argument for lack of notice is that the California statute she was convicted under has been interpreted to cover acts that do not include actual physical contact. This argument is unavailing. Assault traditionally refers to the threatened or attempted use of physical force, not to its successful use, which is termed battery. Wayne R. LaFare, 2 Subst. Crim. L. § 16.1(a) (3d ed.) ("Battery requires such an injury or touching. Assault, on the other hand, needs no such physical contact; it might almost be said that it affirmatively requires an absence of contact."). A statute is not void for vagueness when its terms are used in accordance with their generally accepted meaning. See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 501 (1982). Muhammad also cannot prevail on the nondelegation issue. Muhammad's complaint is that the statute limits the discretion of enforcement officials, not that it enlarges it. This is the exact opposite of the problem the nondelegation component of the void-for-vagueness doctrine is designed to address. See Cleveland Fire

vagueness doctrine in the present case, the undersigned does not

Fighters, 502 F.3d at 551. Accordingly, it is recommended that Muhammad's void-for-vagueness claims be dismissed.

E. Procedural Due Process

The Secretary seeks to dismiss Muhammad's procedural due process claims. "[T]he Due Process Clause provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures." Chandler v. Vill. of Chagrin Falls, 296 F. App'x 463, 468 (6th Cir. 2008) (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)). To state a procedural due process claim, Muhammad must plausibly allege that: (1) she has a property interest protected by the Due Process Clause; (2) she was deprived of this property interest; and (3) the state did not afford her adequate pre-deprivation procedural rights. Id. at 469 (citing Hahn v. Star Bank, 190 F.3d 708, 716 (6th Cir. 1999)).

The problem with Muhammad's procedural due process claims against the Secretary is that it was the state defendants, not the Secretary, who prohibited Muhammad from having access to her daycare. To state a claim against the Secretary for procedural due process violations, Muhammad would have to allege some action or inaction by the Secretary or the agency he heads that led to the deprivation of a protected property interest. Against the Secretary, Muhammad alleges only that the federal statute and its

reach this issue.

implementing regulations "have no provision for any predeprivation notice or hearing of any kind." (ECF No. 1.) This is true, in the sense that though the statute and its implementing regulations require disqualified persons to have a notice and an opportunity to appeal, they do not require those processes to take place before a disqualified person is denied access to a covered childcare facility. See 42 U.S.C. § 9858f(e)(3). But the statute and its implementing regulations also do not require denial of access before a hearing. Id. As explained in the preamble to the final rule implementing the federal disqualification provisions, "[s]tates have the option of allowing child care providers to employ staff members or prospective staff members while they are involved in the appeals process." 81 Fed. Reg. 67438, 67503. Using this discretion, TDHS elected not to allow Muhammad to access her daycare during the pendency of her appeal of disqualification. If this violated the Constitution, Muhammad's remedy lies against TDHS officials, not the Secretary. It is recommended that Muhammad's procedural due process claims be dismissed.

F. Equal Protection

The Secretary's final argument is that the complaint fails to state a claim for a violation of the Equal Protection Clause. The Fifth Amendment provides co-extensive protections to the Fourteenth Amendment's Equal Protection Clause. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 fn. 2 (1975). "To state an equal protection claim, a

plaintiff must adequately plead that the government treated the plaintiff 'disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis.'" Ctr. For Bio-Ethical Reform, Inc. v. Napolitano, 648 F.3d 365, 379 (6th Cir. 2011) (quoting Club Italia Soccer & Sports Org., Inc. v. Charter Twp. Of Shelby, Mich., 470 F.3d 286, 299 (6th Cir. 2006)).

Even assuming that the complaint plausibly alleges that the federal government treated Muhammad disparately as compared to similarly situated persons, the complaint nevertheless fails to allege that such treatment burdens a fundamental right or targets a suspect class. Because neither a fundamental right nor a suspect class is at issue, Muhammad's equal protection claim is reviewed under the rational basis standard. Club Italia Soccer & Sports Org., 470 F.3d at 298. "Under rational basis review, official decisions are afforded a strong presumption of validity." In re Flint Water Cases, 384 F. Supp. 2d 802, 844 (E.D. Mich. 2019) (citing Walker v. Bain, 257 F.3d 660, 668 (6th Cir. 2001)). "And even at the motion to dismiss stage, this presents a formidable bar for plaintiffs to surmount." Id. (citing Theile v. Michigan, 891 F.3d 240, 243 (6th Cir. 2018)). "To plausibly allege that state action fails under rational basis review, plaintiffs must negate 'every conceivable basis' which might support the challenged conduct." Id. (quoting Davis v. Prison Health Servs., 679 F.3d 433,

438 (6th Cir. 2012)). "Courts do not consider the wisdom of the challenged action[,] and defendants do not need to offer any justification. It is enough that the reviewing court can fairly conceive of one existing." Id. (citations omitted). As the court found in the context of substantive due process, there is a rational relationship and legitimate government interest in limiting access to children by workers who have been convicted of a violent felony. It is recommended that the Motion to Dismiss Muhammad's equal protection claim be granted.

III. RECOMMENDATION

For the reasons above, it is recommended that the Secretary's Motion to Dismiss be granted.

Respectfully submitted,

s/ Tu M. Pham

TU M. PHAM
United States Magistrate Judge

September 26, 2019 _____
Date

NOTICE

WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY OF THIS REPORT AND RECOMMENDED DISPOSITION, ANY PARTY MAY SERVE AND FILE SPECIFIC WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS. ANY PARTY MAY RESPOND TO ANOTHER PARTY'S OBJECTIONS WITHIN FOURTEEN (14) DAYS AFTER BEING SERVED WITH A COPY. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(2); L.R. 72.1(g)(2). FAILURE TO FILE OBJECTIONS WITHIN FOURTEEN (14) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.